Caraustar Mill Group, Inc. d/b/a Cincinnati Paperboard *and* Paper, Allied-Industrial, Chemical and Energy Workers International Union Local 5–0609, AFL–CIO–CLC. Case 9–CA–38996

August 21, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

On January 10, 2003, Administrative Law Judge Karl H. Buschmann issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified, and to adopt the recommended Order.

The issue presented is whether the judge correctly found that the Respondent did not violate Section 8(a)(5) and (1) of the Act when it unilaterally changed its "trading time" shift policy to eliminate trades of less than a full shift. For the reasons stated below, we adopt the judge's dismissal of the complaint.

As explained more fully by the judge, the Respondent has long maintained a policy that permitted an employee to trade with or assign a scheduled work shift or portion thereof to another employee. The trade is undertaken by completion of a form entitled "Schedule Change Request," which identifies the employees involved and the precise change. The request form is then submitted to a supervisor for approval. Because of the administrative burden of tracking the trading of partial shifts, as well as its perceived effect on the Respondent's attendance control program, the Respondent unilaterally changed the policy to limit trades to full shifts only.

We agree with the judge that sections 2 and 4 of article XXIV of the parties' bargaining agreement allowed the Respondent to change its shift trading policy unilaterally.[2] Thus, Section 2(b) of the agreement confers on the Respondent the "sole responsibility" to operate the plant and direct the work force, including "[t]he righ[t] to . . . schedule, and assign work." Section 4 states that "The Union recognizes the right of the Company to make and put into effect changes in working conditions," and provides that the Company is to keep the Union advised as to "major" working condition changes that it puts into effect in the plant from time to time. Section 4 defines "major" working condition changes as those dealing with "elimination of jobs, creation of new jobs, and substantial changes in existing job requirements." When such major changes occur, section 4 provides that the parties will negotiate any changes that may be required in existing hourly wage base rates. If no agreement can be reached in hourly base rates, the matter may be submitted to arbitration.

We agree with the judge, for the reasons he states, that the shift trading time policy, at its core, pertains to the scheduling and assigning of work: one employee is taking the assigned shift of another.

Under the terms of article XXIV, section 2, the Respondent retains the sole responsibility and right to schedule and assign work. See *Good Samaritan Hospital*, 335 NLRB 901 (2001) (provision conferring on employer the right to determine appropriate staffing levels permitted implementation of staffing matrices);[3] *United Technologies Corp.*, 287 NLRB 198 (1987), enfd. 884 F.2d 1569 (2d Cir. 1989) (provision conferring on employer the right to make and apply rules for discipline privileged change in progressive disciplinary policy).

We also agree with the judge, for the reasons he states, that the trading time policy cannot be considered a "major" change in working conditions as defined in section 4 of the contract. Indeed, Union President Peter Eversole testified that it was not. Accordingly, we conclude in agreement with the judge, that sections 2 and 4 of article XXIV exempt the trading policy from the Company's bargaining obligation.

Because the Respondent had no duty to bargain over the trading policy, the Respondent did not violate Section

[1] No exceptions were filed to the judge's finding that the Respondent did not violate Sec. 8(a)(5) and (1) by requiring the Charging Party to vacate in-plant office space.

[2] In dismissing the complaint, the judge applied a "clear and unmistakable" waiver standard to the conduct at issue, consistent with Board precedent. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Johnson-Bateman Co.*, 295 NLRB 180 (1989). In *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993), the court found appropriate a "contract coverage" analysis, rather than a clear and unmistakable waiver analysis, where the contract covers the issue in dispute. Members Schaumber and Acosta find that under either standard dismissal of the complaint is warranted. Member Liebman relies on the judge's clear and unmistakable waiver analysis.

In dismissing the complaint, Member Schaumber finds it unnecessary to pass on whether sec. 4 of the contract constitutes a waiver of the conduct at issue in this case.

Member Acosta notes Member Liebman's concurrence, setting forth her view that the contract provisions here raise more compelling circumstances for finding a waiver than do certain other cases previously decided by the Board. He does not find it necessary to discuss whether the present case raises a more compelling circumstance for finding a waiver than do those cases. He holds that dismissal is appropriate under either a contract coverage or waiver analysis, and observes that to the extent that waiver is questioned in this case, a contract coverage analysis provides clear grounds for dismissing the complaint.

[3] Member Liebman did not participate in *Good Samaritan Hospital* and finds it unnecessary to rely on the result in that case.

8(a)(5) and (1) of the Act when it unilaterally changed its trading time policy to eliminate trades of less than a full shift. We shall, therefore, dismiss the complaint.

ORDER

The recommended order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER LIEBMAN, concurring.

I agree that, in conjunction, sections 2 and 4 of the collective-bargaining agreement amounted to a waiver of the Union's right to bargain over a change in the "trading time" shift policy.

I write separately to deal with precedent that the majority does not address. In my view, the contract provisions here raise more compelling circumstances for finding a waiver than did the contract provisions in *Miami Systems Corp*., 320 NLRB 71 (1995), enf. denied sub nom. *Uforma/Shelby Business Systems* v. *NLRB*, 111 F.3d 1284 (6th Cir. 1997) (provision conferring on employer, inter alia, the right to schedule and assign did not privilege unilateral elimination of third shift), and *Beverly California Corp*., 326 NLRB 153 fn. 3 (1998), enfd. in relevant part 227 F.3d 817 (7th Cir. 2000) (provision conferring on employer the right to schedule its operation and work force did not privilege implementation of a master schedule that reduced the hours and earnings of unit employees). In those cases, the unilateral conduct at issue had a substantial economic component and, as a factual matter, went beyond the kind of scheduling present in this case: the substitution of one unit employee for another unit employee, at the employees' request, during a scheduled shift assignment.[1]

I also view this case as distinguishable from *Dearborn Country Club*, 298 NLRB 915 (1990). In that case, more general contractual provisions were found lacking in specific authorization to privilege a unilateral change in overtime distribution. Here, the essence of the "trading time" policy is the scheduling and assigning of work enumerated in section 2 of article XXIV.

Linda Finch, Esq., for the General Counsel.
Curtis L. Cornett, Esq. (Cors & Bassett, LLC), of Cincinnati, Ohio, for the Respondent.
Pete Eversole, of Bethel, Ohio, for the Union.

[1] Although it appears that an employee who has substituted for another employee by trading time may accumulate, as a byproduct of the trade or trades, additional hours of work that could require the payment of overtime pay, this result is incidental to the "trading time" scheduling policy. Indeed, the employee initiating the trade for her own convenience likely will have reduced the hours worked, making overtime pay even less likely.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMAN, Administrative Law Judge. This case was tried on September 10, 2002, in Cincinnati, Ohio, upon a complaint dated March 29, 2002, alleging that the Respondent Caraustar Mill Group, Inc. d/b/a Cincinnati Paperboard, violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by unilaterally changing its policies without bargaining with the Union. The underlying charge was filed by the Union, Paper, Allied–Industrial, Chemical and Energy Workers International Union, Local 50609, AFL–CIO, on January 9, 2002, and amended on March 29, 2002.

Upon motion by the General Counsel, Case 9–CA–39244, which had been consolidated with this case, was severed during the hearing.

On consideration of the entire record, including my observation of the witnesses and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Caraustar Mill Group, Inc. d/b/a Cincinnati Paperboard (Employer or Company) with an office and place of business in Cincinnati, Ohio, is engaged in the operation of a paper mill. With sales and shipment of goods valued in excess of $50,000 directly to points outside the State of Ohio, the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Cincinnati Paperboard is a paper mill, which converts waste paper, such as newspaper, containers, and mixed waste into saleable paper products. It operates on a 24 hour a day, seven days a week schedule. Its general manager from April 1, 1997, to September 9, 2001, was Matthew Sullivan. Since September 2001, Hayward Allan Hall has served as the general manager.

The Company has a long standing bargaining relationship with the Union and operates pursuant to a collective-bargaining agreement, effective from June 19, 1998, to June 19, 2003 (GC Exh. 2).

The parties have been unable to resolve two issues, one deals with the employees' practice of "trading time" and the other involves the Union's in-plant office.

With respect to the former, the record shows that the Respondent had for many years maintained a policy whereby an employee was permitted to trade shifts with another employee. Peter Eversole, an employee and president of Local 609, described the policy as follows (Tr. 22):

> The trading time policy was a means to let men get some time off when they needed it, for whatever reason, and they could have their relief come in early for them, or stay over late for them, and that way they wouldn't get an occurrence under the Attendance Control Program.

. . . .

We would fill out what we call a Trading Timesheet, and I would say, for example, I would ask my relief if he would come in two years early for me, and if he agreed to it, the [sic] we both would sign a form and then turn it into our foreman, and then our foreman would either okay it or deny it, and that—that's how we went about doing it.

The policy had been of concern to Matthew Sullivan, the prior plant manager, because, in his words, "the attendance control program was being completely circumvented" when there was "no timeframe in which these swaps had to be arranged" (Tr. 205). He discussed the issue with the Union and decided to change the existing policy in 1999 (Tr. 205–206):

So, my decision was to make the policy that shift swaps or trading time had to be approved by management at least by the end of, [sic] of that employee's shift preceding the one that he wanted to trade. So, in essence that was a 12-hour timeframe.

The new general manager, Allan Hall, started his position on September 10, 2001, and was soon confronted with the problems associated with the trading time policy. Not only did he perceive that an attendance problem existed at the plant, but he also became aware that the payroll clerk, Pam Alexander, had difficulties keeping track of the shift changes. During a union management meeting on October 16, 2001, Hall informed the Union that he wanted to change the trading time policy to full shifts. Eversole, speaking for the Union, responded that they should "talk about it" and "work something out on it" (Tr. 30). The matter was postponed until the next union management meeting on November 13, 2001.

During the November union management meeting, Hall informed the Union of two policy changes, one dealing with the trading time, the other dealing with an in-plant office for the Union, as recalled by Eversole as follows (Tr. 31):

The trading time policy to full shifts only. And, he told me at that time it was because it was creating a big burden on Pam Alexander, who was our payroll clerk, to keep track of everything. And he also informed me that he wanted the Union to vacate the Union office by the end of the month.

At that point, I—I asked Mr. Hall verbally to negotiate the two items, and he told me he didn't feel he had to negotiate. And, I pointed out to him that, you know, I thought under NLRB Rules that they were mandatory negotiable items.

The Union reacted by making an oral and written request to bargain, as reflected in the following excerpt of a letter, dated Nov. 15, 2001, to Hall (GC Exh. 4):

On Tuesday November 13, 2001, during our monthly union management meeting, you informed the union of two changes that the company was going to implement immediately. 1. The company is going to change the requirement for trading time. i.e.: if an employee wishes to trade time with another employee, it must be for the full shift. 2. The company has told the union that they must vacate the union office. And the union will not be permitted to have a union office on company propriety.

This union is hereby requesting to bargain on the two above-mentioned changes.

The Respondent implemented the changes and so informed the employees by memorandum dated November 29, 2001 (GC Exh. 8):

Effective December 3, 2001, employees may trade shifts, in whole shift increments only, provided that prior approval by management has been obtained to insure qualification and responsibility of coverage. The Schedule Change Request Form must be authorized by management at least 48 hours before the beginning of the affected shift.

Employees following this procedure will not be charged for an occasion in the mill attendance program.

The Union repeated its request to bargain by letter of December 3, 2001 (GC Exh. 6).

The Respondent made a detailed written response, dated December 21, 2001. Relevant excerpts of the letter appear below (GC Exh. 7):

In response to your letter of December 3, 2001, I believe it appropriate to once again state the Company's position with respect to the shift-swapping and union office issues. As I indicated to you in my November 27, 2001 letter, the Company is changing the shift-swapping policy currently in place because the partial swapping of shifts has created a significant clerical burden on the Company and could potentially cause the Company problems with respect to its obligations to comply with federal wage-hour laws. Moreover, and as I also previously indicated to you, the Company believes that the partial swapping of shifts is being utilized as a means of circumventing the Attendance Control Program.

For all of these reasons, combined with the fact that, under Article XXIV, Section 2 of the Contract, the Company has the "sole responsibility" for "the operation of the plant and direction of the work force," including the right to assign work, the Company has decided to change the shift-swapping to prohibit the partial swapping of shifts. We do not believe that we have any duty to bargain with the union over this issue merely because we have tolerated the practice of the partial swapping of shifts in the past and reject the suggestion that this policy has somehow risen to the level of a contractual right.

. . . .

With respect to your request to negotiate the Union Office issue, you will recall that when Mr. Sullivan allowed the Union to take up residence in the present space approximately two years ago, this was on a non-precedent setting basis and only while the space was available.

Currently, the space is needed to expand our test area and allow for additional storage space and we have not been able to find a suitable replacement office for the Union. Though the Company maintains that this is not a negotiable item, the Company is willing to pursue other ideas the Union may have been regarding the Union office

> and files, at a mutually agreeable time in the near future. In the meantime, however, the Company requires that the Union remove its files from the lab area by January 4, 2002.

As indicated in its letters, and its oral communications to the Union, the Company implemented a change in the trading time policy and, in response to the Company's request, the Union vacated the in-plant office.

The General Counsel argues that the two policy changes must be considered mandatory subjects of bargaining, and that the Respondent violated the Act by its refusal to bargain in good faith with respect to both unilateral changes, the trading time policy and the in-plant office. The Respondent argues that the changes were clearly within the purview of the management rights clause contained in the collective-bargaining agreement, which operates as waiver by the Union of its bargaining rights.

Analysis

Trading Time

Neither party disputes the basic facts in this case, that for many years the Respondent permitted its employees to trade full and partial shifts. Indeed, the policy is the subject of a proviso in the collective-bargaining agreement (GC Exh. 2). The Respondent unilaterally changed and modified that policy by prohibiting the trading of partial shifts. The Respondent had notified the Union of its intention to change the policy but repeatedly rejected the Union's requests to bargain. That the trading time policy is a mandatory subject of bargaining is also not seriously in dispute. The General Counsel, citing case law, correctly submits that similar working conditions have been considered mandatory subjects of bargaining in the past, and that this policy is considered one as well. The Respondent has not raised the issue, presumably because it seems clear that an employee's right to effectively change his or her working hours go to the heart of an employee's conditions of employment. I accordingly agree that an employer who intends to effectuate any changes in the existing trading time policy must first afford the Union the opportunity to bargain in good faith.

The Respondent, however, argues that the Union had waived its bargaining rights about the issue. Referring to several provisions in the collective-bargaining agreement, the Respondent insists that the policy change was clearly justified as a management decision for at least two reasons. First, the Company had incurred a certain financial liability under the wage-hour regulations to make up for past overtime earned by employees as a result of the shift trading practice. It had to pay several employees overtime pay due for a 2-year period as a result of a grievance filed by union president, Peter Eversole. Second, the Company's payroll clerk, Pamela Alexander, was frequently faced with the frequent and burdensome task of keeping track of the shift changes where some employees traded as little as half hour shifts and where several employees may have covered one employee's shift.

The General Counsel does not take issue with the Respondent's justifications for its policy changes, but argues that the Respondent had a duty to bargain, and that the contractual provisions relied upon by the Respondent are generally worded management rights clauses, sometimes referred to as "zipper" clauses, which cannot be construed as waivers of statutory bargaining rights.

Article XXIV of the contract provides in part as follows (GC Exh. 2):

> ARTICLE XXIV-RESPONSIBILITIES
>
> Section 2. The parties recognize that the operation of the plant and the direction of the work force therein are the sole responsibility of the Company, subject to the terms and conditions of this Agreement and letters of understanding. Such responsibility includes among other things:
>
> (a) The right to discharge, discipline, demotes, layoff, or suspend for just cause, subject to Article XXII of this Agreement.
>
> (b) The rights to hire, schedule, and assign work.
>
> (c) The right to transfer, promote, demote, layoff or recall, subject to Article XX of this Agreement.
>
> . . . .
>
> Section 4. The Union recognizes the right of the Company to make and put into effect changes in working conditions. It is the policy of the Company to keep the Union advised as to major working condition changes, which it puts into effect in the plant from time to time. Such major working condition changes are those, which deal with elimination of jobs, creation of new jobs, and substantial changes in existing job requirements. When such major working condition changes occur, the parties agree to negotiate any changes that may be required in existing hourly base rates. If no agreement can be reached, then such item may be submitted to arbitration in accordance with the provisions of Article XIX.

It is well settled that the Board generally scrutinizes a management rights clause to assure that it properly and specifically can be construed as a waiver for specific unilateral action. A waiver will not be inferred lest the employer can demonstrate that the union "clearly and unmistakenly" waived its right to bargain over work rule, as for an example an attendance policy. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 (1983). Management rights clauses, which are couched in general terms and make no reference to the particular subject will not likely be considered as waivers of statutory bargaining rights. *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989), *AK Steel Corp.*, 324 NLRB 173 (1997).

The management rights clause at issue contains several provisions, which go beyond a mere general proviso in at least two respects. First, in addition to the Company's right "to discharge, discipline, demote, layoff, or suspend for just cause," the agreement recognizes "the right to hire, schedule, and assign work." The authority to schedule and assign work appears to me sufficiently specific to include the right to make changes in the employees` shift assignments including the right to make changes in the trading of shifts policy. Second, according to the agreement, the "Union recognizes the right of the Company to make and put into effect changes in working conditions" and requires the Company to advise the Union and negotiate any changes when "major working conditions" are involved,

namely "those which deal with elimination of jobs, creation of new jobs, and substantial changes in existing job requirements." I believe that a change in the trading time policy cannot be construed as a substantial change in existing job requirements. Stated differently, a change in policy, permitting the employees` to trade only full or complete shifts, rather than partial and full shifts, can hardly be defined as a major working condition or a substantial change. Finally, I also find that an interpretation of the two contractual provisions, quoted above, appears entirely consistent in their intent to exclude this policy change from the Company's bargaining obligation. I find that the Union waived its right to bargain over this issue and I accordingly dismiss this allegation in the complaint. *United Technologies Corp.*, 287 NLRB 198 (1987), enfd. 884 F.2d 1569 (2d Cir. 1989). See *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999).

The In-Plant Office

In late 1999, when Eversole became union president, he asked former general manager Sullivan to use a vacant room in the plant as an office. Sullivan agreed, provided that the space would not become a hangout for employees. Since May 2000, the Union has used the room as an in-plant office. At a union-management meeting in September 2000, the Respondent notified the Union that it had to vacate the office, because the space was needed by the Company to store testing equipment. The parties discussed several alternatives, including providing the Union with additional lockers in another part of the building. In its written response of November 27, 2001, Hall advised the Union that the space was provided "on a non-precedent basis for as long as the office space was available," but that the space was now needed by the Company. The letter also stated that if the Union were willing to pay the costs for an office, the Company would be willing to discuss and negotiate such a proposal (GC Exh. 5). In a subsequent letter, dated December 21, 2001, the Company reiterated its willingness "to pursue other ideas the Union may have regarding the Union office and files," but also stated "that this was not a negotiable item," and requested "that the Union remove its files from the lab area by January 4, 2002." Although the Union had requested to bargain, it vacated the office on January 4, 2002.

The General Counsel submits that the use of an in-plant office by the Union is considered a mandatory subject of bargaining, and that the Respondent's unilateral action violated the Act, citing *American Ship Building Co.*, 226 NLRB 788 (1976), and *BASF Wyandotte Corp*., 274 NLRB 978 (1985). The Respondent, argues that the Union used the office for only 18 months, that the Respondent had permitted its use by the Union on a conditional bases and that it was not provided to the Union pursuant to any collective bargaining.

In *American Ship Building*, supra, the Board held that the Respondent was not under an obligation to bargain with respect to the movement of the union office, because the company's actions were not made unilaterally. There, as here, the company had given notice to the union of its intentions, meetings were held during which the company explained its reasons, alternate sites were discussed, and months passed before any action was taken. The General Counsel, in an effort to distinguish that case from the case at bar, observed that, here, the Respondent rejected the Union's request for alternate spaces and only offered storage space for the filing cabinet. However, the record shows that the Respondent was willing to discuss other alternatives. I find the scenario in this case to be sufficiently similar to the one in *American Ship Building*, supra, and I conclude that the Respondent actions did not violate the Act, after considering the following significant factors in this case. First, I found not a scintilla of evidence in the record of anti-union animus by the Employer. Second, the Company originally provided the space to the Union in a manner comparable to the granting of a favor or a privilege rather than by negotiation or by any other means. It seems that such a privilege can be taken away in the same fashion without going through the bargaining process, otherwise an employer may think twice before agreeing to a similar union request in the future. Finally the Union has not demonstrated that its loss of the particular in-plant office adversely affected or interfered with the employees` major working conditions. According to the management rights clause, the union waived its bargaining rights.

CONCLUSIONS OF LAW

1. The Respondent, Caraustar Mill Group, Inc. d/b/a Cincinnati Paper Board, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

On the basis of the foregoing findings of fact, conclusions of law, and the entire record, I issue the following recommended[1]

ORDER

The complaint is dismissed in its entirety.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.